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Supreme Court of the United States

OCTOBER TERM, 1952

No. [redacted]116

346 U.S.
ATK-A
3

EDWARD FOSTER ATKINS
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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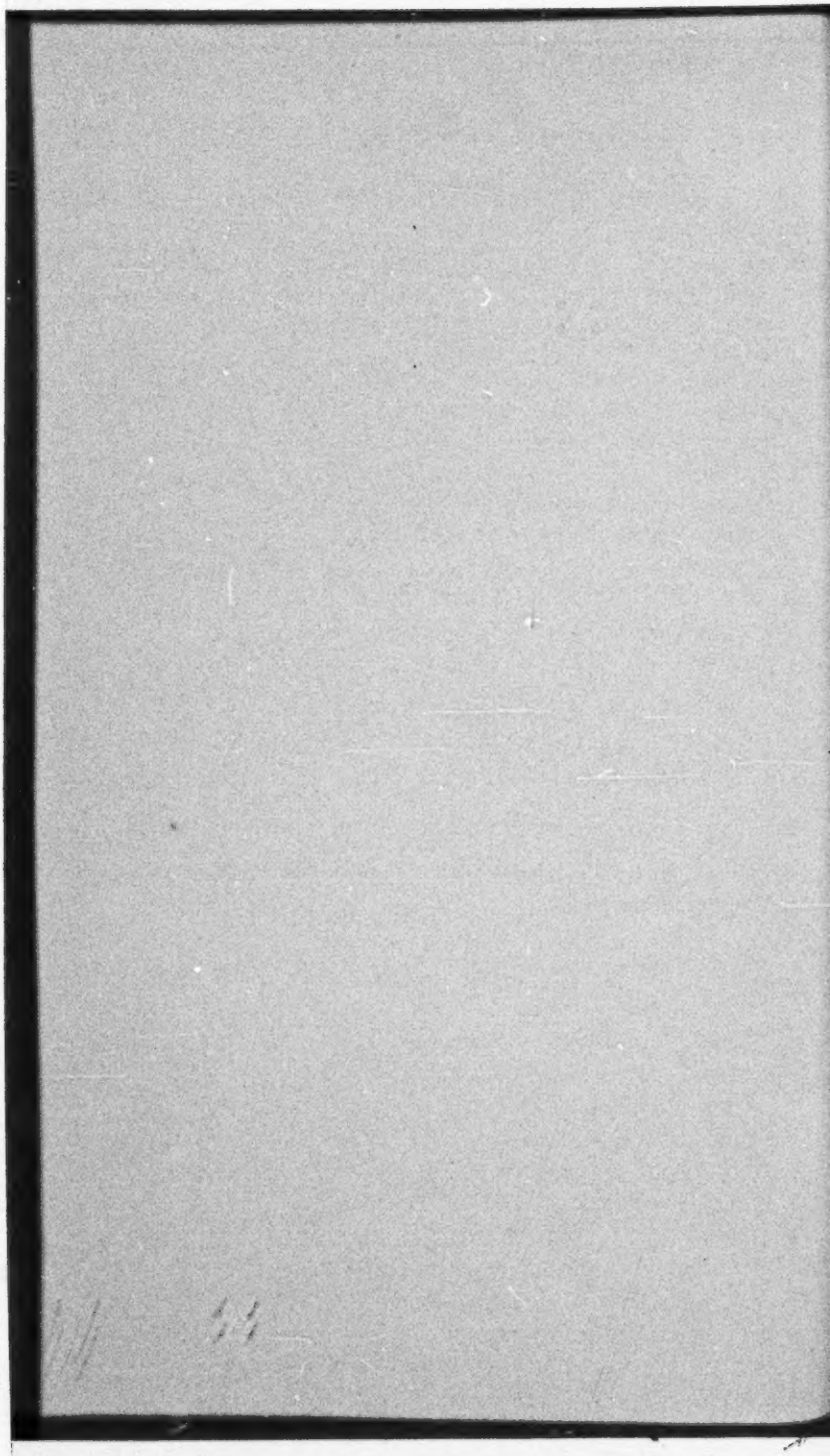

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Supreme Court of the United States

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MAY IT PLEASE THE COURT:

The petitioner, Edward Foster Atkins, says that a writ of certiorari ought to issue to review the judgment of the court below. That court erroneously overruled an important question of law. The court also decided a question directly in conflict with decisions in other circuits by affirmance of the conviction.

Opinion Below

The opinion of the court of appeals [25-29][1] is not yet reported.

Jurisdiction

The judgment of affirmance was entered May 4, 1953. [29] Mr. Justice Clark extended the time for filing the petition for writ of certiorari in this case to June 13, 1953. This Court has jurisdiction under 28 U. S. C. 1254 (1).—See also Rules 37 (b) and 45 (a), Federal Rules of Criminal Procedure.

Question Presented

How Involved

Section 1624.2 (a) provides for personal appearance as a right following the first classification by the local board. Atkins requested and was granted a hearing upon personal appearance. Section 1624.2 (c) requires a new classification following the personal appearance. The local board, following personal appearance, did not make a *de novo* classification. It merely decided that the claim for exemption as a minister be denied and notified Atkins of his right of appeal.

The question presented, therefore, upon this petition for writ of certiorari is:

Did the courts below commit reversible error in failing to hold that the local board deprived petitioner of his right to procedural due process of law upon personal appearance through failure to consider his case *de novo*, classify him anew after his personal appearance and mail a new

[1] Numbers appearing herein within brackets refer to pages of the printed Record in this case.

notice of classification (SSS Form No. 110) as required by Section 1624.2 of the Selective Service Regulations?

Statutes and Regulations Involved

The indictment was returned pursuant to the provisions of Section 12 (a) of the Selective Service Act of 1948 (50 U. S. C. App. § 462 (a), 62 Stat. 622).

Section 1624.1 (a) of the regulations provides that the registrant "shall have an opportunity to appear in person before the member or members of the local board designated for the purpose".—32 C. F. R. § 1624.1 (a), page 801.

Section 1624.2 of the Selective Service Regulations provides:

> "1624.2 *Appearance Before Local Board.*—(a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does appear shall be entered in the 'Minutes of Actions of Local Board and Appeal Board' on the Classification Questionnaire (SSS Form No. 100).
>
> "(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The

member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

"(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and *shall again classify the registrant in the same manner as if he had never before been classified.* [Emphasis added.]

"(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, *shall mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 1623.4 of this chapter.* [Emphasis added.]

"(e) Each such classification shall be followed by the same right of appeal as in the case of an original classification."—32 C. F. R. § 1624.2, page 802.

Section 1624.3 of the Selective Service Regulations provides:

"1624.3 *Induction Postponed.*—A registrant shall not be inducted during the period afforded him to appear in person before a member or members of the local board, and *if the registrant requests a personal appearance he shall not be inducted until 10 days after the Notice of Classification (SSS Form No. 110) is mailed to him by the*

local board, as provided in paragraph (d) of section 1624.2."—32 C. F. R. § 1624.3, page 802. (Emphasis added.)

Statement of the Case

This criminal action was instituted by the return and filing of an indictment. [2] Petitioner was charged with "failing and refusing to be inducted into the service of the armed forces of the United States after having been ordered to do so". [2] He pleaded not guilty on arraignment. [9] The case was tried on October 20, 1952. [10] He waived trial by jury. [3] The facts were stipulated. [11-18] The court reserved decision at the conclusion of the arguments and requested counsel to submit briefs. [19]

On November 8, 1952, the trial court filed a memorandum opinion, overruling petitioner's legal contentions and finding him guilty. [3-6] On November 14, 1952, petitioner was sentenced to three years in prison. [6-7, 20-22] He filed written notice of appeal. [7-8] Statement of points relied on was duly served and filed. [1] The court of appeals heard argument and considered the briefs. In an opinion it held that the order of the board denying the exemption was equivalent to a classification and declared that no substantial rights on appeal had been denied. [25-29] The judgment of the court affirmed the conviction on May 4, 1953. [29]

Facts

Petitioner registered with his local board on July 20, 1949. [11] He filed a classification questionnaire, claiming exemption as a minister of religion. [3, 13] On October 18, 1950, he was classified by the local board in I-A. [11] Within the time required by law he requested in writing a personal appearance before the local board. [11] He appeared and orally discussed his case on November 15, 1950.

[11] The local board record showed an entry dated November 15, 1950, reciting, "11-15-50, the local board request for classification denied." [16] The Assistant United States Attorney stated, "They took affirmative action in the fact that they did deny it." [16]

On November 17, 1950, following the personal appearance, the local board, through its clerk, wrote petitioner as follows: "This is to advise your request for IV-D classification is denied by the Board. However, as your case was re-opened when you appeared before the Board and submitted additional evidence, you have the same right of appeal as you had at the time of your original classification." [11, 17-18] The petitioner took an appeal to the appeal board in writing following his receipt of this letter. [11]

On January 12, 1951, he was classified for the second time in Class I-A, which was by the appeal board. [11] He was mailed notice of this classification on January 18, 1951. [11] His case was appealed to the president and, on April 16, 1951, he was given by the president his third I-A classification. [12] On April 27, 1951, he filed with the local board a conscientious objector questionnaire (SSS Form 150). [12] This form was not provided by the local board with which petitioner was registered. [14] He requested, when filing the form, that his file be reopened and he be reclassified, which request was denied. [12]

Thereafter the petitioner wrote to the State Director of Selective Service requesting that he intervene in petitioner's behalf to have a hearing on his conscientious objector status. On May 29, 1951, the state director wrote to him, refusing to take any action or direct a reopening of his case. [12]

On December 7, 1951, the local board issued an order to report for induction on January 14, 1952. [13] Petitioner reported at the induction station but, after going through the selective process, refused to submit to induction. [13]

He was arrested, charged with a violation of the draft law, and indicted for refusing to submit to induction. [13]

Reasons for Granting the Writ

An important question of federal law is involved. The decision below is in conflict with holdings of other courts of appeals. The importance of the question and the conflict shall now be demonstrated.

The decision below conflicts with *Knox* v. *United States*, 200 F. 2d 398 (9th Cir.). The opinion of the court in that case reveals that the draft board failed to give the registrant a *de novo* classification as well as failed to mail him a new classification card after a hearing.

Upon the occasion of his hearing on personal appearance the local board did not inform Knox of any classification. The court of appeals held to the contrary of the courts below.

The right to a *de novo* consideration of the classification is an important one. The petitioner was entitled to be heard entirely anew as though he had never before been classified. The *de novo* consideration of the case by the local board upon personal appearance is essential to ensure justice and due process of law. In fact, the matter of personal appearance is recognized by the judiciary as being an indispensable factor of equal justice under law in the trial courts. It is fundamental that the appellate courts always yield to the finding of the trial court or jury upon issues of fact because the trial court is in better position to judge the matter than the appellate court, inasmuch as the trial court has the advantage of the personal appearance of the litigants and witnesses.

The promulgators of the regulations fixing the procedure to be followed by the local board after a personal appearance intended that the rights of the registrant before the appeal board as well as before the local board be

preserved. Those duties of the local board do not hinge upon whether "new information" was received by the local board.

The facts in this case are identical to the facts in *United States* v. *Graham*, 108 F. Supp. 794 (N.D.N.Y.). Judge Brennan there stated, among other things:

> " . . . Subdivisions (c) and (d) define the duties of the Board after the registrant has appeared before it, and by their terms require that the local board '—shall again classify the registrant in the same manner as if he had never before been classified', and shall thereafter mail to the registrant a notice of such classification.
>
> " . . . An examination of the file in each case indicates a notation dated '2/28/51' on the back of each questionnaire to the effect that there was no change in classification. On the inside of the outside cover of each file there is the notation '2/28/51 appd. before bd. No change in classification.' . . .
>
> " . . . A memo dated February 28, 1951, signed by the acting chairman of the Board, is found in each file and is quoted in part below: 'Registrant presented no new evidence at this hearing and was advised by the board that his classification would remain Class I-A in accordance with the unanimous vote of all the board members present.' . . .
>
> "An appealing argument is made that the continuation of each defendant in the classification given them prior to February 28, 1951, did not affect his fundamental rights and did not violate the spirit of the Selective Service Regulations. It is urged that this is especially true, since each registrant was afforded the right to appeal and had full opportunity to present additional evidence, and that there is no showing that defend-

ants have been either collectively or separately prejudiced.

"Judicial precedent, however, seems to indicate otherwise. As early as 1943, in the case of *United States* v. *Laier*, 52 F. Supp. 392, it was held that the denial of a personal hearing provided for by the Regulations was a denial of due process, and, since the presentation of additional evidence is but one of the rights afforded on such hearing, the argument was rejected that subsequent appeals cure such an error. (See *United States* v. *Romano*, 103 F. Supp. 597.) A personal appearance before the Board and a hearing wherein the position is taken by the Board that the classification could not be reconsidered is, in effect, no hearing at all. It is at least a hearing without hope or relief. The absence of additional evidence or new information did not relieve the Board from the requirement that each registrant be classified anew. (*United States* v. *Stiles*, 169 F. 2d 455) . . .

"In the recent case of Ex parte *Fabiani*, 105 F. Supp. 139, there is discussed the increasing willingness of courts to scrutinize the action of local boards, and the cases cited above, together with *United States* v. *Strebel*, 103 F. Supp. 628, are indicative of the fact that the regulations must be strictly construed in favor of the registrant.

"It is conceded that the board did not mail to any of the defendants the notice of classification, as provided in Regulation 1624.2 (d). This omission in itself, however, does not destroy the validity of the order of induction. (*Martin* v. *United States, supra* [190 F. 2d 755]); it being conceded that each defendant had actual notice on February 28, 1951, that his classification was unchanged."

The facts in this case cannot be distinguished from the facts in *United States* v. *Graham, supra.* It is submitted that the same conclusion should be reached here as there.

The court below failed to follow the decision of the Court of Appeals for the Third Circuit in *United States* v. *Stiles,* 169 F. 2d 455. In that case the defendant, one of Jehovah's witnesses, was treated in the same way as was the petitioner here. The facts are the same in every respect with the facts in this case. The court said:

> "We think that the purpose of the regulation in this regard is to require the local board to consider anew each registrant's classification who appears personally before it and to notify him of its action upon its classification so that he may know definitely the result of his discussion with the board, which, of course, could result in a change of his classification even though he may have furnished no new information to the board. Moreover, § 625.2 (e) gives such a registrant the same right of appeal from such new classification as in the case of an original classification."

The attention of the Court is called to the fact that the regulations are identical under the 1940 Act and the 1948 Act. Section 1624.3 postpones induction under the 1948 Act as did Section 625.3 under the 1940 Act. Until there is a mailing of a new notice of classification following the personal appearance the regulations specifically postpone induction until that act is performed. Since that was not done, there is no jurisdiction to issue the order to report regardless of actual notice on the part of the registrant of a violation of the regulations. Actual notice by the district judge and the Judges of this Court of an oral notice of appeal in no way would confer jurisdiction where there had been no written notice of appeal filed within the time

and manner required by the law in a case taken from the district court to this Court.

Martin v. United States, 190 F. 2d 775 (4th Cir.) is not controlling here. In that case there was a *de novo* consideration, while here there was no new classification. There was a new classification given to Martin. The only default by the local board was its failure to mail a classification card following the *de novo* classification. The court held that to be harmless error in view of the fact that Martin had received actual notice of the classification upon the occasion of his personal appearance and also because the clerk of the board read to him a written memorandum of the *de novo* classification when he came to the local board following the classification made after personal appearance. The *Martin* case is not in point; *Stiles, supra,* is directly in point.

United States District Judge Mellott, in *United States* v. *Kenneth J. Strebel,* 103 F. Supp. 628, in a case similar to this one held that the *Martin* case was distinguishable. He said, *inter alia:*

> " . . . The United States seems to place its chief reliance upon *Martin* v. *United States,* 190 F. 2d 775; so, preliminary to a discussion of the evidence in this case, a short analysis of the three cases will be made.
>
> "In the *Zieber* case it was held that if the local board refused to receive or reconsider new or additional evidence tendered by the registrant at a 'personal appearance,' or if it failed to make a 'full and fair compliance with the provisions of the (Selective Service) Act and the applicable regulations,' due process of law had not been afforded and a conviction upon a charge of knowingly failing to comply with an order of the board could not be upheld. In the *Stiles* case the applicable regulations were set out and the 'crucial

provision' discussed (625.2, and especially subdivisions (d) and (e) thereof) was construed 'as requiring the classification anew of each registrant who makes a personal appearance' and the mailing of a 'notice of classification as soon as practicable after it (the board) again classified him.' (Cf. 1624.2, 32 C. F. R. (1949 Edition) p. 802, set out in the footnote in *Martin* v. *United States, supra.*) In the *Martin* case the soundness of the holdings in the *Zieber* and *Stiles* cases was recognized (see p. 778); but the facts were held to be distinguishable, as, indeed, they seem to have been.

" . . . It has been found as a fact that the local board did not send out S. S. S. Form 110 as required by the regulations *but,* as the clerk of the board admitted, *'allowed the old to drift along'. This, in the court's view, requires that the present motion be sustained.* . . . [Emphasis added.]

"The court finds as a fact that the regulations were not fully complied with. It therefore concludes, as a matter of law, that the motion for a judgment of acquittal at the close of all of the evidence should be granted."

Similar holdings were made by the United States District Court for the Northern District of California in *United States* v. *Laier,* 52 F. Supp. 392, and *United States* v. *Peterson,* 53 F. Supp. 760.

The nonfeasance of the local board was jurisdictional. The order to report for induction could not be issued until after the regulations have been complied with. The steps to be taken as a condition precedent to induction into the armed forces must be strictly followed. Otherwise the order to report is void. (See *Ver Mehren* v. *Sirmyer,* 36 F. 2d 876, 882 (8th Cir.).) "There must be full and fair compliance with the provisions of the Act and the applicable regulations."—*United States* v. *Zieber,* 161 F. 2d 90 (3rd Cir.).

It may be argued that the petitioner was notified by the local board that there would be no change and that thereafter he appealed. These are undisputed and admitted facts. But they are entirely irrelevant and immaterial as to whether the board complied with the regulation. The right to a *de novo* consideration was mandatory. A new classification and a reclassification were required. The impact of the regulation could not be evaded by telling petitioner that his classification would not be changed.

The most important board to the registrant is his local board. The men that make up such a board can be seen. They can observe the registrant. They can see the sincerity of the registrant. They perform to the registrant the same function that the trial judge performs to the litigant. The function on a personal appearance is much like a new trial following the granting of a new trial by a trial judge. The making of a proper request in writing under the regulations produces as a matter of course under the law a new trial before the board. The new trial or *de novo* function cannot be nullified successfully by saying that the judgment will remain the same. It is the duty of the tribunal to actually conduct a *de novo* trial. When it is not done the law is violated. Such is the case here according to the admitted facts.

A reference to the memorandum of the hearing made by the board in the *Martin* case (190 F. 2d 775 (4th Cir.)) shows that it is not applicable. It shows in the *Martin* case that the draft board reclassified Martin after the hearing. The memorandum said:

> "The registrant is continued in I-A and as he has noted an appeal, the file will be forwarded to the Board of Appeals having jurisdiction in Virginia after he has had a physical examination." —See page 36 of the Stenographic Transcript of the Reporter filed in No. 6293 in the United States Court of Appeals for the Fourth Circuit (no

printed record was filed in the Martin case because it was a forma pauperis appeal).

The testimony of the witnesses showed when Martin was called back into the meeting room he was told he had been reclassified. The chairman said to him: "You are continued in I-A." The word "continued" did not mean that Martin was not reclassified nor did it prevent the I-A after personal appearance from being a new classification, a reclassification. It was. He was reclassified. There was no evidence showing (like here) that the board refused to reclassify Martin upon personal appearance. Martin's board, as just stated, did reclassify him after the hearing. He got a second I-A from the board. Atkins never got a second I-A classification from the local board. He was never reclassified.

The entry in the minutes, on the back of the questionnaire, in the Martin case reads: ((1) the first I-A *after filing the questionnaire*)

> "4-28-50 Class I-A"—See page 8 of the Stenographic Transcript of the Reporter filed in No. 6293, United States Court of Appeals for the Fourth Circuit;

((2) the second I-A *after personal appearance*)

> "12-8-50 Continued Class I-A"—See page 47 of the Stenographic Transcript of the Reporter in No. 6293, United States Court of Appeals for the Fourth Circuit.

The minutes in Atkins' case show no classification of any kind. The attorney for the respondent agreed that the minutes showed that Atkins was not reclassified by the local board. [11, 17-18] At another place in the record he said of the original I-A that Atkins "did not receive any further classification from the local board" and that the only action taken on the personal appearance was "request for 4D denied". [14-15] Government counsel agreed with the attorney

for Atkins and again told the court that Atkins was not reclassified. [15] Even the trial judge himself echoed the words of counsel for respondent that Atkins was not reclassified. [15] Again it was agreed that the local board took no action to reclassify Atkins after personal appearance. [15] Counsel for the Government, apparently reading from the minutes on the back of the questionnaire, said "the local board request for classification denied". [16] This meant IV-D, not I-A. They denied IV-D. They had given him I-A to begin with.

The mailing of the letter stating the denial of the claim for IV-D rather than sending the Form 110 (notice of classification), as was done when the I-A classification was made each time by the appeal board and once by the local board, further supports Atkins that he wasn't actually reclassified.

The refusal of a IV-D by the local board did not mean a I-A classification was made by the local board. How can it? Other classifications may have been given Atkins. Section 1623.2 of the regulations (32 C. F. R. § 1623.2) provides for consideration of several different classifications (other than I-A) "with Class I-A-O considered the highest class and Class I-C considered the lowest class", including Class IV-D and Class V-A. The request for a IV-D does not limit the board to that one exemption or deferment. Others must also be considered. (*Cox* v. *Wedemeyer*, 192 F. 2d 920 (9th Cir.)) With all these different classes in the law for the local board to deal with, can it be said that the denial of the IV-D spells I-A?

How can it be said beyond as reasonable doubt that the board records show that it made a I-A classification, either with or without the word "continued"? Don't you gentlemen have some doubt about it?

It may well be that the local board intended to give Atkins Class I-A after the hearing. But it didn't! There's a great difference between doing a thing required by law to be done and intending to do it! Isn't there? Can we find that one does an act required by the regulations purely because he intended to do it? If so, then we'd better move from the field of law and fact into the wilderness of metaphysics. When we do this then we'd better give up.

Conclusion

For the reasons stated, it is submitted that this petition for writ of certiorari should be granted.

Respectfully,

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Counsel for Petitioner

June, 1953.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 116

EDWARD FOSTER ATKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 25-29) is reported at 204 F. 2d 269. The memorandum opinion of the District Court (R. 3-6) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 1953 (R. 29). On June 1, 1953, the time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Clark to and including June 13, 1953, and the petition was filed

on June 12, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether petitioner was denied any procedural rights under the Selective Service Act of 1948 with respect to consideration, *de novo* classification, and notification of classification, following his personal appearance before his local board.

REGULATIONS INVOLVED

Section 1624.1, 32 C.F.R. (1949 ed.), provided:

> *Opportunity to appear in person.* (a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended * * *.

Section 1624.2, 32 C.F.R. (1949 ed.), provided:

> *Appearance before local board.* (a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. The fact that he does

appear shall be entered in the "Minutes of Actions of Local Board and Appeal Board" on the Classification Questionnaire (SSS Form No. 100).

(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it had not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified.

(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as

soon as practicable after it again classifies the registrant, shall mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of § 1623.4 of this chapter.

(e) Each such classification shall be followed by the same right of appeal as in the case of an original classification.

Section 1624.3, 32 C.F.R. (1949 ed.), provided:

Induction postponed. A registrant shall not be inducted during the period afforded him to appear in person before a member or members of the local board, and if the registrant requests a personal appearance he shall not be inducted until 10 days after the Notice of Classification (SSS Form No. 110) is mailed to him by the local board, as provided in § 1624.2(d).

Section 1626.2, 32 C.F.R. (1949 ed.), provided in pertinent part as follows:

Appeal by registrant and others. (a) The registrant, any person who claims to be a dependent of the registrant, any person who prior to the classification appealed from filed a written request for the current occupational deferment of the registrant, or the government appeal agent may appeal to an appeal board from any classification of a registrant by the local board except that no such person may

appeal from the determination of the registrant's physical or mental condition.

STATEMENT

Petitioner, having waived a jury trial (R. 3, 18), was tried, on stipulated facts (R. 10-19), in the District Court for the District of New Mexico (R. 22) on a one count indictment, which charged him with "knowingly neglecting, failing and refusing to be inducted into the service of the armed forces of the United States," in violation of section 12 of the Selective Service Act of 1948,[1] and the orders and directions given thereunder (R. 2). He was convicted and sentenced to imprisonment for three years (R. 6-7). On appeal, the judgment of conviction was affirmed (R. 29).

The stipulated facts may be summarized as follows:

On July 20, 1949, petitioner registered with his local Selective Service Board (R. 11). He later filed a classification questionnaire, wherein he claimed exemption from military service as a "full time minister" (Class IV-D) (R. 3, 13). He

[1] 62 Stat. 604, 622, 50 U.S.C. App., Supp. V, 462(a), which provides in pertinent part:

"Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or of the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, * * * or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *."

sought no other classification at that time (R. 13). On October 18, 1950, the local board placed him in class I-A (R. 11).

On November 15, 1950, at his request, petitioner personally appeared before his local board, which heard his oral testimony concerning his classification (*id.*). Following petitioner's appearance, the local board made the following entry in its records: "11-15-50, the local board request for classification denied" (R. 16; Pet. 6). On November 17, 1950, the local board sent petitioner a letter stating (R. 11, 17-18, 3):

> This is to advise your request for IV-D classification is denied by the Board. However, as your case was re-opened when you appeared before the Board and submitted additional evidence, you have the same right of appeal as you had at the time of your original classification.

The local board "retained" petitioner in class I-A, but it did not mail him a new notice of classification (SSS Form No. 110) (R. 11, 14-16).

Pursuant to the suggestion in the letter from the local board, petitioner appealed his classification to the Appeal Board, which, on January 12, 1951, also classified him I-A and notified him of such classification (R. 11). Petitioner then appealed to the Presidential Appeal Board, which, on April 16, 1951, similarly classified him, and notified him of its classification (R. 11-12, 4).[2]

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[2] On April 27, 1951, petitioner filed with his local board a conscientious objector's form, which he secured from some source other than the local board (R. 12, 14, 18, 19). The

On December 7, 1951, petitioner was ordered by his local board to report for induction on January 14, 1952 (R. 13). On that date, January 14, he reported at the induction station, but refused to take the requisite one step forward to complete his induction into the armed forces (*id.*).

ARGUMENT

Petitioner does not deny (Pet. 2, 5) that he was granted a full and fair hearing at the time of his personal appearance before the local board. He claims (Pet. 2-3, 7-16) that, following such hearing, the local board denied him procedural due process in that it failed to consider his case *de novo*, to classify him anew, and to mail him a new notice of such classification on the prescribed SSS Form No. 110, as required under 32 C.F.R. (1949 ed.) 1624.2(d). He argues that the order to report for induction, which he concededly disobeyed, was therefore void. His claim is without substance.

a. *The local board considered petitioner's classification de novo.*—The record, particularly the part thereof relating to the letter from the local board to petitioner (Statement, *supra*, p. 6), clearly shows that the local board reopened petitioner's classification when he appeared before it, and after granting him a hearing, during which he submitted additional evidence concerning his claim to be placed

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local board refused to reopen his classification to consider his new claim and the State Selective Service Director upheld the action of the local board (R. 12). Petitioner does not now challenge the propriety of the local board's action in refusing to consider his claim as a conscientious objector (Pet. 2-3).

in class IV-D, it decided to deny him the requested classification. There is no evidence that the local board conducted the hearing merely to permit petitioner to add new information to his Selective Service file, or that it had determined not to consider petitioner's claim to IV-D classification unless he offered information not previously considered by the board, as were the situations in *Knox* v. *United States,* 200 F. 2d 398 (C.A. 9), and *United States* v. *Graham,* 108 F. Supp. 794 (N.D. N.Y.), upon which petitioner heavily relies (Pet. 7-10). As the court below pointed out (R. 27), the local board did not at the hearing deny petitioner any right to which he was entitled under the Selective Service Regulations. He was permitted to discuss his classification with the board, to point out any information in his file that he thought the board may have overlooked, and to present whatever new information he desired.

The action taken by the local board after that hearing, denying petitioner his requested classification and sending him a letter notifying him of its action, was, as the court below pointed out, "tantamount to again placing him in class I-A, and it constituted substantial compliance with the requirements of section 1624.2(c) of the regulations" (R. 28). *Martin* v. *United States,* 190 F. 2d 775 (C.A. 4), certiorari denied, 342 U.S. 872. Permitting petitioner "to appear in person, hearing his oral statement in full, and considering the whole thereof along with everything which preceded the personal appearance and the making of the statement,

constituted the considering of the case *de novo.* No essential or constituent element of a consideration *de novo* was omitted or denied" petitioner (R. 27). The local board obviously thought that petitioner had been classified *de novo,* for they informed him that since his case had been "re-opened" when he appeared before the Board, he had the same right of appeal as from the "original classification."[3] At the very least, this shows that the board took some "affirmative action to continue in effect his earlier I-A classification." See *Knox* v. *United States,* 200 F. 2d 398, 400 (C.A. 9).[4]

b. *The local board's failure to mail petitioner notice of his new classification on the prescribed selective service form was not a fatal irregularity.* —The manifest purpose of the requirement of 32 C.F.R. (1949 ed.) 1624.2(d) was to allow a registrant to "pursue his right of appeal from the board's determination if he so desires, within the time allowed him for that purpose." *Martin* v. *United States,* 190 F. 2d 775, 779 (C.A. 4), certiorari denied, 342 U.S. 872. The stipulated facts (Statement, *supra,* p. 6) clearly show that upon receipt of the letter from the local board, petitioner was not only fully apprised of its action with ref-

[3]Unless petitioner had been reclassified he would have been precluded from taking an appeal by virtue of the provisions of 32 C.F.R. (1949 ed.) 1624.1, since more than 10 days had elapsed following his original classification.

[4]There is, factually, no analogy, as petitioner seems to think (Pet. 10), between the instant case and *United States* v. *Stiles,* 169 F. 2d 455 (C.A. 3), where the local board merely placed in the registrant's file the affidavit given it at the time of his personal appearance before the board and without any further action forwarded his file to the appeal board.

erence to his claim, but that he followed the board's advice by promptly perfecting an appeal to review its decision. Thus, as the court below held (R. 29), furnishing petitioner "the information by letter rather than on the official form prescribed for that purpose constituted a mere irregularity which in no manner prejudiced him." *Tyrrell* v. *United States,* 200 F. 2d 8, 11 (C.A. 9), certiorari denied, 345 U.S. 910; *Knox* v. *United States,* 200 F. 2d 398, 401 (C.A. 9); *Martin* v. *United States, supra;* see *Bowles* v. *United States,* 319 U.S. 33; *Smith* v. *United States,* 157 F. 2d 176, 182, 183 (C.A. 4), certiorari denied, 329 U.S. 776.

CONCLUSION

The judgment below is correct, and the case presents no conflict of decisions or question of importance. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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